United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 24,915

UNITED STATES OF AMERICA

Appellee

vs

EUGENE E. LUCAS

Appellant

Appeal from Judgment

BRIEF FOR APPELLANT

MYER KOONIN
819 Tower Building
Washington, D.C. 20005

Counsel for Appellant
(Appointed by this Court)

I N D E X

TABLE OF AUTHORITIES

* Cases or authorities chiefly relied upon are marked asterisk.

UNITED STATES CONSTITUTION

6th Amendment

STATUTES

IN THE

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FOR THE DISTRICT OF COLUMBIA

No. 24,915

UNITED STATES OF AMERICA,

Appellee

VS

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Appellant

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BRIEF FOR APPELLANT

This case has not previously been before this Court.

REFERENCES TO PARTIES AND RULINGS

The court's attention is directed to the oral ruling of U.S. District Court Judge George L. Hart, Jr., denying appellant's "Oral Motion to Dismiss". The grounds for the District Court's ruling were not set forth in a written order. (TR 38).

There are no other parties to this litigation.

JURISDICTIONAL STATEMENT

This is an appeal from imposition of sentence, upon conviction by jury of alleged violations of Title 22, Section 1801(b) (Second degree burglary), and Section 2201, (Grand larceny), D.C. Code 1967 ed. This Court has jurisdiction by virtue of Title 28 U.S.C. 1291.

ISSUES PRESENTED FOR REVIEW

I

The Court erred in denying appellant's motion for a directed verdict of acquittal made at the conclusion of the government's case.

II

The Court erred in conferring with counsel for both the government and appellant in his chambers, in the absence of a court reporter or in causing the record to show, subject to approval of respective counsel, a statement of such dispositions as may have been arrived at in the chamber conference.

STATEMENT OF THE CASE

The government, in support of a two count indictment charging appellant with the offenses of second degree burglary /1

/1. Title 22, Section 1801(b), D.C. Code, 1967 ed.

and grand larceny /2 called, as its first witness, Officer Granger, a member of the Metropolitan Police Department, who testified that, on the date alleged in the indictment, he and his partner, responding to a "burglar alarm" arrived at the rear of 3305-8th Street, Northeast, in the District of Columbia, about 11:30 P.M. (TR5-6).

On arrival, upon finding a rear door to said premises partially opened and observing an unidentified figure passing in view the officer ordered the subject to come out upon threat of sending in canine dogs to search the building. Thereupon, appellant, followed by another individual, a juvenile, came out of the building, was placed under arrest and transported from the scene (TR7-8).

The police officer, upon entering the building found, interalia, two guns on a wooden box just inside the door to the premises, some papers scattered around a desk which had drawers opened and "a mess of change" on the floor. (TR11-12).

Officer Granger's testimony was followed by the testimony of Officer Jerome Gray, who corroborated the testimony of his fellow officer (TR18-27 ind.).

As its final witness the prosecution called Ray V. Beaver, president and general manager of the corporation conducting an

/2. Title 22, Section 2201, D.C. Code, 1967 ed.

appliance and commercial kitchen business in the premises - alleged in Count one of the indictment to have been entered by appellant with intent to steal and who testified that he owned the two shot-guns, alleged to have been the property stolen by appellant in Count two of the indictment and that he placed values thereon in the respective sums of $125.00 and $75.00 each (TR31-32).

The witness Beaver, denied knowing appellant, but, in reply to the question "Did you give him (appellant) or ANY-BODY ELSE PERMISSION TO ENTER YOUR PREMISES?", responded, YES SIR. NOT HIM; SOMEONE ELSE." (TR35)[Emphasis supplied]

The prosecution rested its case and thereupon the trial judge denied appellant's motion for a directed verdict of acquittal (TR 38).

Testifying in his own behalf, appellant, admitted his presence in the premises, but said he went into the premises to look for his dog and had no knowledge of any improper conduct by himself or his companion while in the premises.

ARGUMENT

I

The Court erred in denying appellant's MOTION FOR A DIRECTED VERDICT OF ACQUITTAL AT THE CONCLUSION OF THE GOVERNMENT'S CASE.

A

At the conclusion of the case the trial judge properly instructed the jury on the presumption of innocence and the burden of proof that prevails in every criminal case (TR 58).

However well settled the law may be regarding the presumption of innocence and burden of proof so is the law as equally well settled that a jury may not speculate as to the guilt or innocence of a defendant in a criminal case, and a guilty verdict must be supported by evidence sufficient to sustain such a verdict.

In the instant case the prosecution was improperly permitted by the court below, and in the absence of objection by appellant's counsel, to attempt to prove an essential element of the offense charged in the first count of the indictment, namely that appellant ***"entered the premises of Resco, Incorporated, a body corporate"*** (R) by receiving in evidence what purported to be the seal of a corporation (TR29 &37). (Government's exhibit 4).

Whether or not the metal object, purporting to be the seal of a corporation actually bore the imprint of the corporate name is unimportant in the light of the "best evidence rule" which in the instant case required proof of the corporate existence of the premises by Resco, Incorporated in the manner prescribed by law, namely, a certificate of

incorporation duly executed by the proper authority in the state of incorporation.

Accordingly, the trial judge should have, sua sponte, granted appellant's motion for a directed verdict of acquittal on count one of the indictment, even in the absence of argument therein by appellant's trial counsel;

B

The evidence in the instant case clearly demonstrates the government's failure to prove that appellant did NOT HAVE permission to enter the premises in question.

On direct examination, the witness Beaner, obviously called for the express purpose of proving appellant "unlawfully" entered the premises in question, identified himself as the president and general manager of the alleged corporate victim setforth in count one of the indictment and the owner of the property alleged in count two of the indictment, (TR 28) engaged in the following colloquy with the prosecutor.

BY MR. HOFFMAN:

Q. Now, do you know the defendant in this case, Eugene Lucas?

A. No, Sir.

Q. Did you ever give him OR ANYBODY ELSE permission to enter your premises?

A. YES, SIR. Not him: SOMEONE ELSE. (TR35 Emphasis Supplied).

The record is silent as to the identity of "Someone Else", who if produced, by the government, could have established a lack of permission to appellant to enter the premises or to the contrary, a granting to appellant permission to enter the premises. In short the trial judge's error in denying appellant's motion for a directed verdict of acquittal permitted - nay REQUIRED - the jury to speculate and conjecture as to (1) the identity of "Someone else" and (2) as to the evidence and proof that might have been disclosed by the testimony, had it been received in the trial, by the "someone else".

II

The Court erred in conferring with counsel for government and appellant, in his chambers, in the absence of a court reporter or in causing the record to show, subject to approval of respective counsel, a statement of such dispositions as may have been arrived at in the chamber conference.

The learned trial judge, upon denial of appellant's motion "for a directed verdict of acquittal" caused the following statement to be put into the record:

THE COURT: Motion denied.

We have a Lucke matter here which we discussed in chambers prior ro going on the bench, which we need to put in the record. Now, I understand that the defendant is going on the stand and will testify that this juvenile told him that his dog was in the premises, that is, the defendant's dog was in the premises, and the defendant simply went into the premises for the purpose of looking for his dog, and of course, had no knowledge of all this ransacking of desks and moving of guns and money, et cetera. There was no dog found in the premises when the police officers came in.

It therefore appears that the credibility of the defendant becomes a matter of extreme importance. Now, I believe that the defendant has a conviction ---for what? (TR 38)

The record failes to disclose who requests the conference in chamber but clearly discloses that counsel for the respective parties were neither called upon to approve, amend or add to the learned judge's statement concerning any dispositions that may have arrived at in the chamber conference.

In United States of America vs Emanuel W. Simpson; No.24,817, _____vs App. D.C._____;_____

Fed 2 _____; decided July 19, 1971, in a Per Curiam decision by this Court the following dietum is found in the appendix, containing an ORDER of this Court in Samuel Tedesco, appellant vs United States of America, No. 19,229, September Term, 1964:

In future where in the conduct of a criminal case a judge calls a conference with counsel in his chambers, he would be well advised to have a court reporter present to report what occurs. In any event, the record should be caused to show SUBJECT TO APPROVAL OF RESPECTIVE COUNSEL a statement of such dispositions as may have been arrived at in chambers conferences; in short, a recitation in open court of matters material to the determination will thus be brought to the notice of the parties.*

A leading principle that prevades the entire law of criminal procedure is that after indictment found, nothing shall be done in the absence of the defendant.

Had the trial judge in the instant case followed the rule laid down by this Court in the Tedesco case (supra) concerning the conduct of chamber conferences, the foregoing principal prevading the law of criminal procedure may have been satisfied as constituting "Notice to the Parties".

So much of the discussion which transpired during the chamber conference as stated by the trial judge (TR 38) made it

abundantly clear that appellant's defense was involved and therefore, such discussion involved a stage of the proceeding in appellant's absence contrary to his rights guaranteed to him by the Constitution of the United States and Rule 43 of the Federal Rules of Criminal Procedure.

The government may argue that appellant is required to show prejudice at the conference herein complained of; however, the record save for the statement of the trial judge (TR 38) is silent as to anything else that may have transpired and may have been said at the conference. Hence to be required to show something as prejudicial on what the record is silent, and appellant had no opportunity to hear, would be requiring of appellant the impossible.

CONCLUSION

The judgment of conviction of the appellant should be reversed and his indictment dismissed. Failing that, the case should be remaded to the District Court for a new trial.

Respectfully submitted,

BY _____

MYER KOONIN
Appointed by the United States
Court of Appeals
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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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EUGENE E. LUCAS, *Appellant*.

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JOHN A. McCAHILL,
Assistant United States Attorneys.

Cr. No. 638-70

Nathan J. Paulson
CLERK

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TABLE OF CASES

OTHER REFERENCES

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ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Did the court err in denying appellant's motion for judgment of acquittal at the close of the government's case?

II. Did the trial judge err when, in the absence of a court reporter, he conferred in chambers with the prosecutor and defense counsel and thereafter in open court summarized what happened in chambers in a statement from the bench?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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EUGENE E. LUCAS, *Appellant.*

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed April 13, 1970, appellant was charged with second-degree burglary (22 D.C. Code § 1801(b)) and grand larceny (22 D.C. Code § 2201). After a jury trial before the Honorable George L. Hart, Jr., on June 2, 1970, appellant was found guilty of second-degree burglary but not guilty of grand larceny. On December 11, 1970, appellant was sentenced to imprisonment for two to six years. This appeal followed.

At approximately 11:45 p.m. on the evening of March 4, 1970, Metropolitan Police Officers Herbert Granger and Jerome Gray received a radio run to respond to a silent

burglar alarm[1] at the premises of Resco, Incorporated, at 3305 8th Street, N.W. (Tr. 5, 19). At that time the officers were cruising in a scout car six or eight blocks away and traveled the distance to the warehouse in two or three minutes (Tr. 17, 27). Upon arriving at the rear of the warehouse, the officers discovered that the rear door was partially open, about ten or twelve inches, but was secured by a chain which prevented it from being opened completely (Tr. 6, 15, 20). Through the opening in the door the officers saw a figure running within the building and heard what sounded like coins dropping to the floor. It was at this point that the officers identified themselves as police officers and asked the intruder to come out of the warehouse (Tr. 7, 20). Thereupon appellant emerged from the building, accompanied by a juvenile, William E. Powell, and was arrested (Tr. 8-9, 20).

As the two officers entered the warehouse, they noticed a rifle and a shotgun lying on a wooden box a few feet from the rear door (Tr. 9-10, 21-22). A further inspection of the premises revealed an empty gun rack in an office at the opposite end of the warehouse. The drawers of two desks were open; papers were scattered about the premises, and the desks and offices were in a state of disarray. The officers also noticed that a Pepsi-Cola vending machine appeared to have been moved away from the wall. There were shotgun shells on one of the desks in addition to shotgun shells and coins scattered on the floor (Tr. 9-11, 13, 21-23).

Ray Beaver, the president and general manager of Resco,[2] was the last person to leave the warehouse at six o'clock that evening, at which time the two guns were in the gun rack in his office and all the doors were locked (Tr. 29, 31-33). When Beaver returned to the warehouse

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[1] The silent burglar alarm was activated by "any opening of any door or breaking of any window" (Tr. 30).

[2] Beaver testified that Resco was a corporation. A paper bearing the impression of the Resco corporate seal was marked as Government Exhibit No. 4, identified by Beaver and admitted into evidence without objection (Tr. 28-29, 37).

between midnight and 1:00 a.m. in response to a call from the police, he observed that the vending machine had been moved, pennies had been removed from a desk drawer and were scattered on the floor, and the desks had been ransacked (Tr. 29, 34-36). Beaver gave neither appellant nor his juvenile companion permission to enter the warehouse (Tr. 35).

Appellant testified that he went to the rear of 3305 8th Street to look for his dog, Lassy [*sic*], who was seen entering the building by the juvenile.[3] According to appellant, the juvenile brought him to the partially open rear door and entered while appellant remained outside. Five minutes later appellant heard noises inside and entered, and shortly thereafter the police arrived and arrested him. Appellant denied any knowledge of the two guns, the vending machine, the ransacked desks or the scattered coins (Tr. 40-44).

ARGUMENT

I. The court did not err in denying appellant's motion for judgment of acquittal at the close of the government's case.

(Tr. 5-37)

Appellant contends that the supposed failure of the government to prove the corporate existence of Resco, Inc., required the trial judge to grant his motion for judgment of acquittal. He further makes the naked assertion that the trial court was required to grant his motion in spite of the fact that appellant's trial counsel neither objected to the government's proof that the victim of the burglary was a corporation nor urged the point as a ground for his motion for judgment of acquittal. He thus attempts to elevate this insignificant issue to the level of plain error as comprehended by Rule 52(b), FED. R. CRIM. P.

It is a rule of unyielding durability that "[t]he corporate character of the owner or occupant of property stolen or entered may be proved by 'reputation,' *i.e.*, by 'evidence

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ARGUMENT

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[3] The police found no dog in the warehouse (Tr. 28-29, 37).

tending to show that the corporation was de facto organized and acting as such.' " *Bord* v. *United States*, 76 U.S. App. D.C. 205, 206, 133 F.2d 313, 314, *cert. denied*, 317 U.S. 671 (1942), citing *Fields* v. *United States*, 27 App. D.C. 433, 445 (1906); *cf. Bimbo* v. *United States*, 65 App. D.C. 246, 249, 82 F.2d 852 (1936). In the instant case the evidence of the victim's corporate character was overwhelming and went unchallenged by appellant (Tr. 28-29, 37). The evidence here, when viewed in the light most favorable to the government, certainly permitted a reasonable mind fairly to conclude guilt beyond a reasonable doubt. *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).[4]

II. It was not error for the court to confer with both counsel in chambers in the absence of a court reporter.

(Tr. 38)

After denying appellant's motion for a judgment of acquittal, the trial judge made a statement during a bench conference which indicated that he had just had a conference in chambers with both the prosecutor and defense counsel (Tr. 38). It is obvious that the judge was referring to a discussion in which the court and counsel considered the possibility of impeaching appellant with a prior conviction in the event that he became a witness. Appellant now asks this Court to rule that it was plain error for the trial judge to hold such a conference in chambers without a court reporter in attendance.

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[4] Appellant also asks this Court to reverse his conviction on the ground that the government failed to prove that he had no permission to enter the premises of Resco. We view this specification of error as inconsequential. Resco's president testified that neither appellant nor his juvenile companion had permission to enter the premises (Tr. 35). No attempt was made to cross-examine the witness concerning the identity of the mysterious "someone else" to whom appellant refers in his brief. Furthermore, appellant made no claim of permission to enter the premises when he testified in his own behalf (Tr. 40-44).

In support of his argument appellant relies solely on this Court's opinion in *Tedesco* v. *United States*,[5] where by way of dictum this Court suggested that trial judges "would be well advised to have a court reporter present to report what occurs" in chambers. The Court in *Tedesco* also suggested that a reasonable alternative to having the conference in chambers reported is a "recitation in open court of matters material" which were discussed in chambers. In the instant case the trial judge did recite on record the matters that were discussed in chambers, and neither appellant himself nor his counsel made any attempt to object to or amplify the judge's statement. The inescapable conclusion is that the trial judge accurately and fairly recited what had occurred in chambers. Appellant's contention that the trial judge had an affirmative duty to call upon counsel to approve, amend or add to the court's statement is utterly without substance.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
HERBERT B. HOFFMAN,
JOHN A. MCCAHILL,
Assistant United States Attorneys.

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[5] D.C. Cir. No. 19,229, decided May 24, 1965 (unreported), reprinted in *United States* v. *Simpson*, D.C. No. 24,817, decided July 19, 1971, slip op. at 7.

☆ U.S. Government Printing Office: 1971—452-816/389